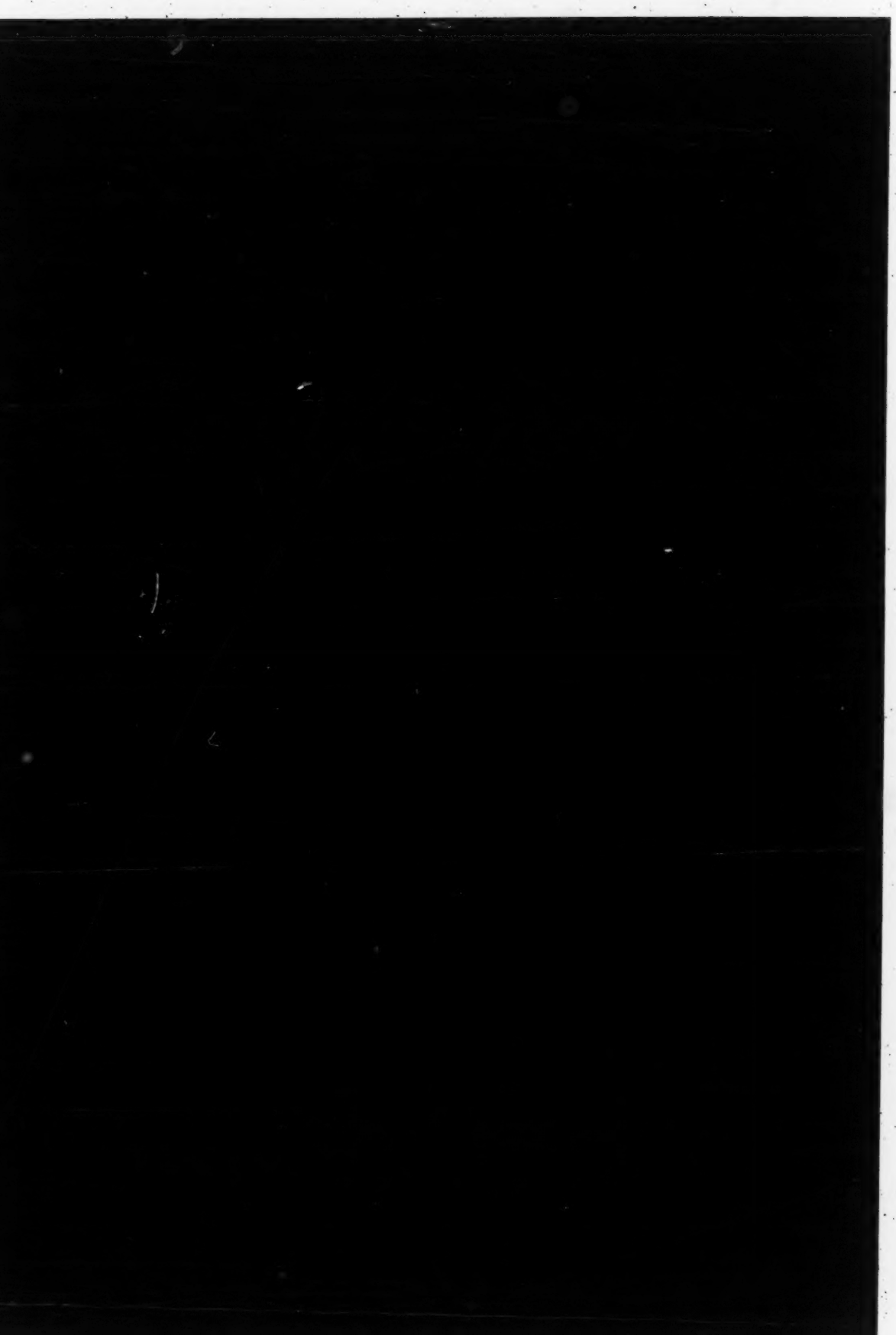

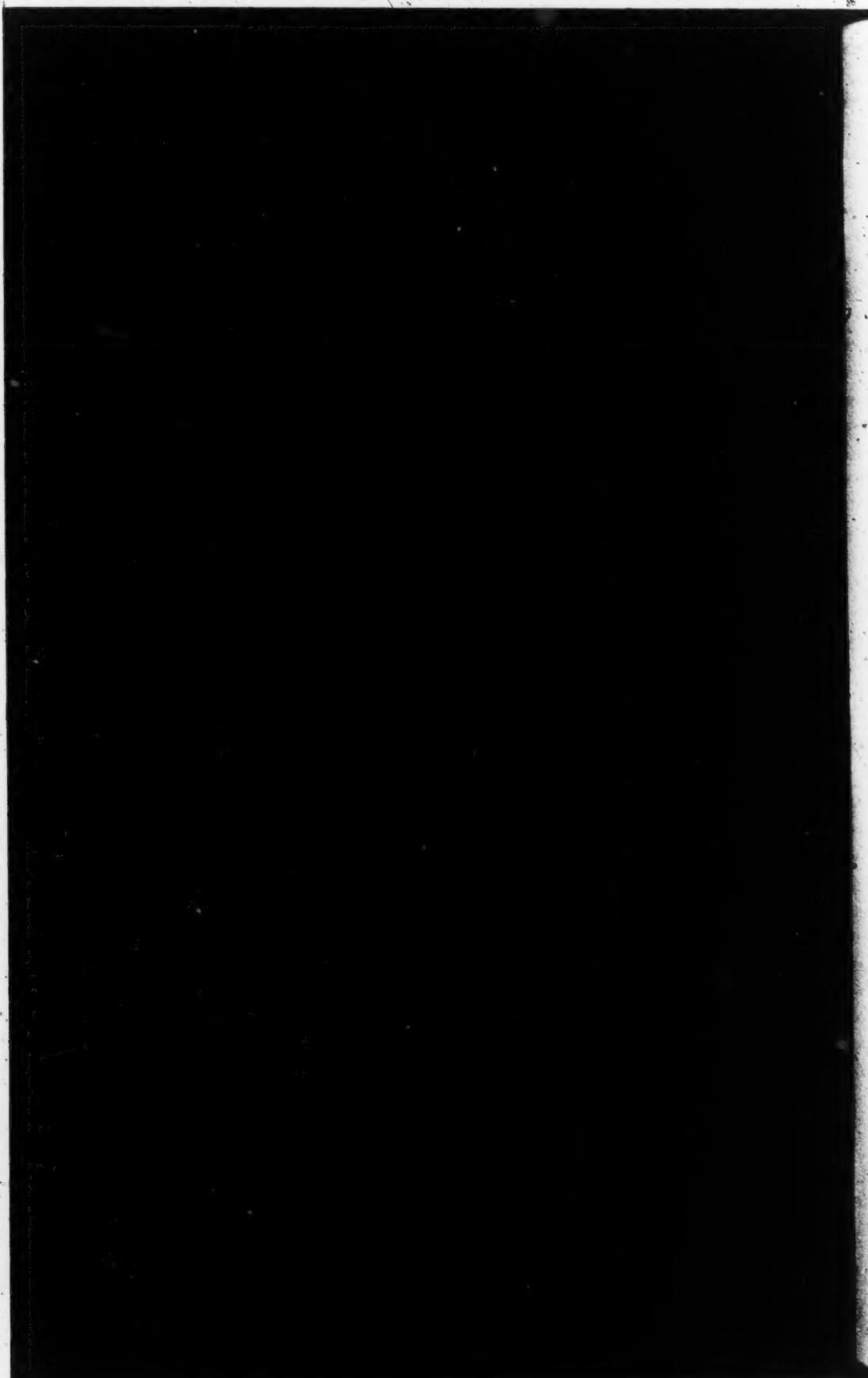

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1967
NO. 623

DOUGLAS LANTZ, d/b/a ALASKA TRUCK TRANSPORT, INC.,	)
Appellant,	)
v.	)
LYNDEN TRANSFER, INC., et al.	)
Appellees.	)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

APPELLANT'S REPLY TO THE MEMORANDUM FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

FOREWARD

Appellant's Statement as to Jurisdiction sets forth the basis of this Court's jurisdiction over this appeal, the statement of the case, and a statement of the questions presented, and contains references to the opinion of the District Court, the report of the Interstate Commerce Commission, and the applicable statutory provisions.

Brief of Appellant in opposition to motion to affirm is by reference made a part of this reply.

The Interstate Commerce Commission is sometimes referred to hereinafter as the Commission.

There has been an intervening matter, in that at a general session of the Commission on May 3, 1967 it deleted in conformance with the United States District Court Decree in Civil Action

No. 289 certain authorities in MC-118530 Sub 3. In this same order the Commission took the almost unprecedented action of reopening this proceeding for further oral hearing. It was subsequently set for hearing July 18, 1967 in Anchorage, Alaska.

On or about October 16, 1967 the Government filed a Memorandum in this matter. The time set for reply was Nov. 7, 1967. It was subsequently extended until Nov. 29, 1967.

It is appellant's position that the questions raised by this appeal are substantial and of general public importance and merit full consideration by this Court and that the judgment of the District Court should be reversed.

ARGUMENT

1.

A reading of the Argument of appellee, Lynden, in its motion to affirm and of the memorandum of the Solicitor General shows their content to be practically identical. There are two exceptions; the footnotes and the noting of certain apparent defects in docketing shown in the memorandum. These apparent defects deserve a brief explanation to show the information in the Solicitor General's office was incomplete.

The notice of appeal did not initially contain the questions presented because appellant did not have a copy of the Supreme Court Rules. Therefore, he followed the Federal Rules of Civil Procedure assuming they were the same. Shortly thereafter, he acquired a copy of the Supreme Court Rules and, noting his omission, filed a designation of record and questions presented in conjunction with appeal. This was accepted by the District Court as evidenced by its forwarding of the record to the Clerk of the Supreme Court for docketing. When filing the Jurisdictional Statement appellant misinterpreted the Supreme Court Rules and printed only the statement, not the Appendices A and B, the opinion and decree of the

District Court. Since the Commission had voted not to appeal the decision, appellant erroneously concluded that the Government and the Commission were no longer parties to the action and, therefore, need not be served. By letter, John F. Davis, Clerk of the Supreme Court, advised appellant of these technical defects and suggested their correction. Appellant immediately complied. It is for this reason the Solicitor General did not receive service until Aug. 13, 1967 even though the jurisdictional statement had been timely filed with the Court. Appellant's filings were surely within the intent of the rules. Certainly, it is within the discretion of the Supreme Court to overlook the technical deficiencies caused by "inadvertant error".

2.

Appellee, in its motion to affirm, and the Government, in its memorandum, point to Consolo v. Federal Maritime Commission, 283 U.S. 607 (1966) as a proper basis for a finding that there was no substantial evidence adduced. Appellant feels it is essential to properly assess and apply Atlantic Refining Co. v. United States, 260 F. Supp. 612 (S.D.N.Y. 1966) and Best Way Motor Freight, Inc. v. United States, 253 F. Supp. 314; 319 (W.D. Wash. 1966) discussed in App. A, J.S., c & d. Since the only case cited by the appellee and the Government is Consolo, only it will be analyzed herein. In Consolo, the Court, in an opinion by Mr. Justice White, stated:

"Section 10(e) of the Administrative Procedure Act (5 USC 1009(e) (1964 ed)) gives a reviewing court authority to "set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, (or) an abuse of discretion . . . (or) (5) unsupported by substantial evidence . . ." We have defined "substantial evidence" as "such relevant evidence as a reasonable mind might accept as adequate to

3.

support a conclusion." . . . It must be enough to justify, if the trial were to a jury, a refusal of fact for the jury . . . . This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.

Congress was very deliberate in adopting this standard of review. It frees the reviewing courts of the time-consuming and difficult task of weighing the evidence; it gives proper respect to the expertise of the administrative tribunal and it helps promote the uniform application of the statutes. These policies are particularly important when a court is asked to review an agency's fashioning of discretionary relief. In this area agency determinations frequently rest upon a complex and hard-to-review mix of considerations. By giving the agency discretionary power to fashion remedies, Congress places a premium upon agency expertise and, for the sake of uniformity, it is usually better to minimize the opportunity for reviewing courts to substitute their discretion for that of the agency. These policies would be damaged by the standard of review articulated by the court below."

The Review Board, Division 1, the District Court and the Government, in its brief to the District Court, assumed that exhibits 2, 3 and 4, representative shipment exhibits, were the total traffic handled and, therefore, not substantial. These exhibits were identified by their titles, "representative shipments". The Government's brief stated that Exhibit 4 for 1961 contained 800,000 pounds (rounded) of general commodities. It also shows a total weight of 130,000 pounds of household goods. Exhibit 7, comparative gross receipts, shows revenue of $474,000 for this same period. Alaska Truck Transport, Inc. Tariff MF-

I.C.C. No. 2, under "Freight, all kinds" shows an LTL rate of $10.00 CWT. It shows a truckload rate of $8.00 CWT. Taking a mean rate of $9.00 CWT times the 800,000 pounds of general commodities would produce revenue of $72,000. From using the rates in our household goods tariffs and tenders and applying an average $22.00 CWT for transportation and accessorial charges times the 130,000 pounds, we would show revenue of $28,600. These would result in a total revenue of $100,600. Our gross revenue for this same comparative period, as shown in Exhibit 7 was $474,000. Thus, the representative shipments shown on Exhibit 4 generated approximately 22% of the gross revenue. A like analysis of Exhibit 3 would be even more conclusive. It would show slightly more than 10% of our gross revenue of $418,000 for that period. Certainly, applying Consolo, any reasonable mind would accept the foregoing as adequate to support a conclusion that these exhibits were merely representative and were substantial.

3.

Under "Argument" in appellee's motion to affirm it is stated that in view of the further hearing conducted on July 10, 1967, this additional remedy makes it unnecessary for the Supreme Court to consider the matter. The Government's Memorandum, under Footnote 2, takes a like stand. This additional remedy was not a matter of right; it was at the discretion of the full Commission. Before the close of this further hearing the Examiner requested the filing of briefs. While appellee, Lynden, and the Government point to this additional remedy appellee protestant, North American, speaking out of the other side of its mouth, in its brief states that "Because the Commission has apparently chosen to ignore the Court's mandate and injunction North American and Lynden Transfer could and obviously would reapply to the Federal Court for an

additional injunction on the ground that the Commission has violated its jurisdiction by granting a further hearing." Further, it moves that the Commission cure its own jurisdictional defect by dismissing these further proceedings on the grounds that the matter is administratively final and that the Commission lacks jurisdiction.

Even if the Commission should act favorably as a result of this further hearing, and the time consuming exceptions and the petitions for reconsideration had become administratively final, North American and Lynden will again go to the Courts for an additional injunction. If, as a result of appellee's motion to affirm and the Government's memorandum of support, the Supreme Court affirms the District Court, in further litigation the position of the Commission and the appellant would be indefensible since the entire record of prior operations would have been declared unsubstantial, in wilful violation of the law, and inadequate to support a grant of authority.

4.

The Government, in Footnote 1 of its memorandum, points to the District Court's finding that our prior transportation of household goods was not considered because it was unauthorized and in wilful disregard of the law. This was an error at law by the District Court. Appellant's application for authority under the Alaska "Grandfather" Amendment, 206(a)(4), was accepted in its entirety. The last paragraph of Sec. 206 (a)(4) states:

". . . if application for such certificate is made to the Commission as provided herein or before Dec. 31, 1960, pending the determination of such application the continuance of such operations without a certificate shall be lawful." (Emphasis supplied.)

It does not state that the final determination must be favorable in order for the operation to

be considered lawful.

If the Supreme Court affirms the above findings of the District Court that appellant's operation conducted during the pendency of its "grandfather" application were "in wilful violation of the law", then it will be finding Sec. 206(a)(4) Part II, of the Interstate Commerce Act to be unconstitutional.

Both appellee and the Government contend that our reference to the "grandfather" proceeding is improper and should not be considered by the Court. The "grandfather" proceeding is a collateral matter in that it shows our operations were under "color of law" during the pendency of this application and, further, that as a result of the pendency of "grandfather" legislation and the application, our permanent authority application filed in August of 1959 was not heard until August of 1963. This was an administrative decision of the Commission. Appellant contends that as a result he was denied "due process" of law. It was not set for hearing regularly and in accordance with established rules and principles. Had the Commission interpreted the "grandfather" amendment to the Act at the time of its enactment in early 1960 as disqualifying appellant, it would have set the PCAN for immediate hearing. In view of our rapidly growing operations, as shown by Exhibit 7, the authority would then have been granted without question. The operations pointed to as "unlawful" were performed under legally filed tariffs and tenders approved by the Commission. Both our petition for a finding of GTI and our motion for a new trial pointed to these grave administrative errors and omissions. We know this was an inadvertant error on the part of the Commission, but nonetheless damaging to one in our position.

5.

It is appellant's position that in view of its being denied "due process" by the Commission, for

purposes administratively connected with the "grandfather" amendment, that the only evidence of record to be applied in support of this application for permanent authority should be that which would have been presented if this hearing had been held timely. This should have been in 1960, or at the latest, 1961. Appellant contends that operations since 1962 should have no bearing on this application. In spite of the fact that we did not submit representative shipment lists for 1962 and part of 1963, the record shows in Exhibit 7 that in the year prior to March 31, 1962 there were gross revenues of $474,000 and at March 31, 1963, $367,000. This certainly does not indicate the "abrupt cessation" of operations shown in the District Court opinion.

6.

The District Court erred in finding the household goods service of North American Van Lines, Inc. adequate. It completely ignores the testimony in the Sub 3 hearing of Mr. Manfield that their highway operation was between Great Falls, Montana and points in Alaska and the fact that their shipment exhibits showed no shipments to or from Alaska and west coast states via direct highway service through Seattle. He further testified that any traffic from the west coast destined for Alaska moved through the port of Seattle by water and was handled by their agent, Smyth. He also testified that they do not show any shipments through Seattle, thence through the Montana gateway to Alaska. North American's Exhibit 15 showed a total of 480,000 pounds. He testified that this was the total Alaska traffic handled in a one year period. It should be noted that our representative shipment list, Exhibit 4, shows 130,000 pounds of household goods moved in one year and that this represented only about 20% of the total handled. Obviously, we handled at least an amount equal to North American in one year. This would certainly indicate

that our household goods operations were substantial. As stated in Nashua Motor Express, Inc. v. United States, 230 F. Supp. 646, the Court found that it was unnecessary to find the services of the existing carriers inadequate if the new service would be "a different kind of service" and provide competition. The Commission found appellant was providing "a different kind of service" which protestants were not inclined or authorized to perform. In the further hearing Mr. Maxfield again testified that North American does not provide direct highway service between Seattle and Alaska.

7.

The filing of the Government's memorandum in this matter came as a complete surprise and shocked appellant. In view of the full Commission's obvious belief that an injustice had been done appellant and, as a consequence, its reopening for further hearing, appellant cannot believe that the full Commission authorized the General Counsel's participation in the Government memorandum. Appellant believes that this was an independent action of the General Counsel's office. Appellant has criticized the defense put forth by the counsel for the Commission in the lower court. Its failure to present evidence available in its own files such as tariff participation approved by the Commission covering operations found to be unlawful in the lower court as well as correspondence from the Commission showing conclusively that the Commission was fully aware and knowingly permitted the continuation of operations found unlawful by the lower court is the basis for this criticism. Appellant has pointed out that the Commission denied it due process in failing to timely set his Sub 3 application for hearing. In his motion for new trial in the lower court, on pg. 2 reason 6, he states: "The Government could not adequately defend this action without admitting to grave administrative errors and omissions."

The Commission and its counsel could not adequately defend or appeal this matter without admitting publicly that the policing agency for the carrier industry had knowingly permitted and condoned an unauthorized operation. Appellant is aware that such a public admission could, and probably would, have a detrimental effect in preventing and prosecuting unauthorized operations by carriers without the "grandfather" aspects present in this case.

Appellant has testified under oath in oral proceedings and written pleadings that it continued operations because it was advised by Commission personnel that it could do so. The Commission has never denied that it so advised appellant. Appellant has repeatedly attempted to get into the record a declaration by the Commission as to its position in reference to this. He has, with one exception, been unsuccessful. Mr. William F. Meehan, Jr., District Supervisor of the I.C.C. at the time involved, reluctantly made an affidavit stating the position of the Commission relative to operations of Alaska carriers such as Alaska Truck Transport, Inc. This was Exhibit 10 in our motion for new trial in the lower court. In the further hearing in July of 1967, appellant attempted to subpoena Mr. Hugh Chaffee, successor of Mr. Meehan, to testify relative to the Commission position. The day of the hearing Mr. Chaffee was under a Doctor's care for an injured hand and did not appear.

To further support our belief that the full Commission recognized that an injustice had been done appellant, at a general session it voted not to appeal the lower court decision (we believe for the reasons stated above), but did take the almost unprecedented action of reopening on its own motion, this matter for further hearing.

In view of our belief that the full Commission still felt that we were entitled to the authority granted in its initial order and its subsequent setting the matter for further hearing, we felt certain that the participation in the Government

memorandum by the General Counsel's office of the I.C.C. was an administrative decision of that office and had not been authorized by the full Commission. To further support our belief that this was a decision of the General Counsel's office is the fact that since the full Commission has assumed jurisdiction of this matter, it was necessary for it to vote as to whether it should appeal the lower court decision and make this decision the subject of an order, it would also have been necessary, if the full Commission believed that it should oppose our appeal, to have voted and made its decision a subject of an order. No such order has been issued by the full Commission.

Because of this belief appellant requested additional time to reply to the Government memorandum so that he might attempt to get an expression from the full Commission as to whether it had authorized the General Counsel's office to participate in this memorandum, or at least an expression of neutrality. Consequently, appellant filed a "Request for the full Commission on their own motion to consider prayer for extraordinary relief". His prayer, preceded by arguments, stated:

> "WHEREFORE, we pray that the full Commission advise the Supreme Court of, at least, its neutrality, or, in the alternative, advise appellant by collect wire that this Government memorandum in support of the motion to affirm was an independent administrative act of the Solicitor General and/or, if so, the General Counsel's office and does not reflect the opinion of and was not directed by the full Commission".

Appellant hoped, but frankly did not expect, the full Commission to disavow the administrative action of its General Counsel's office. It was his position that even a denial of his prayer, if the order did not actually sanction the action of the General Counsel, would indicate neutrality. At a general session of the I.C.C. on Nov. 2, 1967 an

order was issued stating: "It is ordered, that Alaska Truck Transport, Inc.'s, above-styled pleading be, and it is hereby, denied." Since the order did not approve the action of the General Counsel's office, the Commission has assumed a position of neutrality and it is evident that the participation in the Government memorandum was an action of the General Counsel's office not pursuant to an order of the full Commission.

CONCLUSION

The District Court's finding our operations under 206(a)(4) were unlawful is an error at law or 206(a)(4) is unconstitutional.

We were denied "due process" in that our PC&N application was not set for a timely hearing.

The Government's continued support of the motion to affirm will result in, if affirmed, an indefensible position for both the Commission and appellant when, as indicated in North American's brief, they reapply to the Federal Court for an additional injunction against the further hearing. We, therefore, have no additional remedy.

The comparison of our representative shipment exhibits and our gross receipts exhibit prove that our operations were substantial.

They were performed under legally filed tariffs and tenders.

The only authorized household goods carrier operating between Alaska and the other states admits, on the record, that it does not provide direct highway service between Seattle and Alaska.

The additional matters pointed to by appellee and the Government, as contained in our questions, are subsidiary and collateral matters contained in the present record.

The Government errs in stating that the only basic question presented by the jurisdictional statement is the substantiality of evidence and in the application of Consolo. It ignores the application of Best Way and Armored Carrier in reference

to unauthorized or unlawful operations. It ignores the application of the "Grandfather" Amendment to the Act, 206(a)(4), relative to lawful continuation of operations without a certificate.

The Government ignores errors at law and constitutional matters relating to due process.

The Government contends that the appeal should be dismissed because of certain apparent defects in docketing. All filings by appellant were made timely within the spirit of the Rules. Appellees, the real parties of interest, made no objections to these supposed defects. In fact, appellee, North American Van Lines, Inc., has not even filed a motion to affirm, or any other pleading, in this Court.

The Commission's denial of the prayer of appellant, while it does not disavow the action of its General Counsel, does not approve the action and, therefore, is an expression of neutrality.

Appellant submits that the questions presented by this appeal are substantial and of general public importance and merit full consideration by this Court and that the Decree of the District Court should be reversed.

Respectfully submitted,

Douglas Lantz, Per Se, for
Douglas Lantz d/b/a
Alaska Truck Transport, Inc.
Appellant

P.O. Box 797
Anchorage, Alaska 99501
333-6200